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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD J. KNAPP,

Petitioner,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether Petitioner was denied a fair and impartial trial due to the preclusion of evidence bearing on defense witness Torina's bias and motive to testify falsely, which preclusion was upheld by the Court of Appeals in spite of the sworn affidavits of two jurors directly contradicting and impeaching the rationale of said decision?

2. Whether the Trial Court's jury instruction on embezzlement was erroneous and confused the issues of tax fraud and evasion rightfully before the jury?

3. Whether in a Specific Item tax fraud and evasion prosecution should net worth and expenditures evidence be admissible without Government compliance with certain safeguards?

4. Whether the standard of judicial conduct was breached by the numerous remarks of the Trial Judge bearing on the veracity and credibility of Petitioner and defense witnesses and by 30 sua sponte rulings favorable to the prosecution.

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, in the above entitled case.

OPINION BELOW

The opinion of the Court of Appeals (Appendix C, *infra*) is not reported.

JURISDICTION

The judgment of the Court below was entered on April 23, 1982. (Appendix C, *infra*). A timely petition for rehearing and rehearing en banc was denied on June 9, 1982. (Appendix D, *infra*).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

2. Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. United States Code, Title 26, Section 7201:

> Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof,

shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

4. United States Code, Title 26, Section 7206(1):

(1) Declaration under penalties of perjury. — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

STATEMENT OF THE CASE

Petitioner, Richard J. Knapp, was charged with failing to report $10,589.00 of income for the year 1977 and $6,410.00 for 1978, in violation of Title 26, USC §7206(1). Petitioner was also charged with owing a total of $6,722.00 in taxes to the Internal Revenue Service for the years 1977 and 1978 from said unreported income, in violation of Title 26, USC §7201.

Petitioner was employed by NBC from May, 1973, to March 15, 1979, as a Unit Manager. As a Unit Manager he was responsible for the coordination of all facilities and services for the production of television network programs, such as golf tournaments, football games and special events. Most expenses were paid at the remote location through an invoice system.

The Government's principal witnesses at trial were vendors who had done business with NBC at remote locations.

Several vendors produced records which reflected business transactions conducted with NBC through Petitioner. Four vendors did not produce the appropriate records and testified from memory as to the goods and services they provided NBC.

The Government introduced the expense vouchers of Petitioner which dealt with golf tournaments and football games during 1977 and 1978. The amounts reflected on said expense vouchers exceeded the amount of goods and services provided by the vendors, according to their testimony and records.

The Knapps bought a house in East Hampton in 1977 for $42,000. There is a $30,000 mortgage on the house. The Knapps spent $3,000 to $4,000 in furnishings in 1977.

In 1978, Knapp set up a film company of his own and operated the company at a loss, totalling $16,174. The majority of these business expenses were paid in cash to union people working evenings and weekends. The Knapps had a maid in 1977 and 1978.

On rebuttal, the Government called former Unit Manager, James Huie, to testify. Huie had recently signed a non-prosecution agreement. He testified that he stole money from NBC and that Petitioner told him that he inflated receipts to steal money also. He also stated that the Knapps had a well-stocked bar, large bookcases, and a couple of three-quarter inch video tape machines.

Defense

Petitioner disputed the testimony of five vendors: Willie McCoy, Forest Oaks Country Club, Onion Creek Country Club, Chester's Bakery and Lynn Catering. Joseph Torina, a former Unit Manager, and Co-Unit Manager with Petitioner on many of the events in question, corroborated much of what Petitioner testified took place between him and said vendors. Four of these vendors could not produce records to substantiate their testimony.

As to receipts in general, Petitioner was compelled to sign vendors' names to receipts, itemize goods and services rendered and mark them "paid" to comply with Unit Manager standards for receipts.

The reasons therefor were often due to the exigencies inherent to the job and the circumstances encountered, Unit Managers were often not able to obtain a receipt. Receipts were lost occasionally or otherwise deemed unacceptable pursuant to Unit Manager standards.

Petitioner admitted that receipts from several vendors had been inflated. The difference between the altered receipts and the actual expenditure were used to cover regularly incurred non-voucherable expenses.

Pursuant to an accepted system that existed at NBC for many years, Unit Managers incurred necessary and expected non-voucherable expenses while carrying out NBC purposes. This system maintained good relations among the entire crew, obtained cooperation and special favors from vendors, and, generally treated key people, involved with an NBC production, in a special way.

Petitioner admitted increasing the amounts on certain receipts to cover his non-voucherable expenditures. These expenditures were in line with the standard operating procedures at NBC, as corroborated by Torina, Koiv, Rutlege and even Government witness Huie to some extent, all former Unit Managers.

For example, Petitioner purchased tickets and souvenirs for hotel personnel from whom NBC frequently received favors; he bought food, liquor, fruit, flowers and cigarettes for NBC executives; he paid for certain damage caused by NBC personnel; he paid local police to escort talent to airports; and, he entertained those doing business with NBC and certain NBC personnel.

Petitioner's expense vouchers are conspicuously devoid of receipts for the aforementioned expenditures.

Torina corroborated the majority of Petitioner's testimony. Aavo Koiv, a former Unit Manager, John Bennett, a current NBC technical supervisor and Robert Owens, a parttime NBC employee also corroborated portions of Petitioner's testimony.

Hence, Petitioner spent the money not for himself, but for NBC purposes.

Reasons for Granting the Writ

I

THE RATIONALE OF THE COURT OF APPEALS, IN UPHOLDING THE PRECLUSION OF EVIDENCE BEARING ON DEFENSE WITNESS TORINA'S BIAS AND MOTIVE TO TESTIFY FALSELY, WAS DIRECTLY CONTRADICTED AND IMPEACHED BY THE SWORN AFFIDAVITS OF TWO JURORS.

In his defense, Petitioner called Joseph Torina, a former Unit Manager, to testify. Torina was a Co-Unit Manager with Petitioner on many of the events which were the subject of the trial herein.

Through cross-examination, the Government showed Petitioner and Torina to be partners who worked together extensively and often discussed receipts and vouchers. Torina, just weeks before Petitioner's trial, was tried and acquitted of charges which grew out of the *same* circumstances, not parallel, as noted by the Court of Appeals.

Torina's credibility and good character were also indirectly attacked by Government witness, Charles Gilman, who testified about "financial irregularities" in the Unit Managers' Department of NBC and the mass firings as a result thereof. James Huie, a Government rebuttal

witness, who signed a non-prosecution agreement, also implicated Torina in the corrupt practices of certain NBC Unit Managers.

Thus, the one and only logical inference to be drawn regarding Torina's reliability as a witness was that he had personal bias and an interest in a favorable outcome of the litigation for Petitioner. The jury was compelled to infer that, since Torina was so involved with Petitioner, if Torina assisted Petitioner in defending himself, Petitioner would do the same for Torina, once he was indicted and tried.*

The Court of Appeals, in rejecting this claim, said it was "speculative" that the "jury may have drawn inferences undermining the credibility of this defense witness in the absence of evidence of his prior acquittal."

It is a fact that the adverse inference that Torina had a motive to testify falsely was drawn by the jury. Two jurors willingly made sworn statements that they drew the deadly inference. Petitioner had a right to combat that. Since he was not given this opportunity, his key witness was rendered worthless. See affidavits of Ruth Lauterstein and Max Charmaz attached hereto. (Appendix H, *infra*, and Appendix I, infra, respectively).

The probative value of the evidence that Torina was previously indicted, tried and acquitted, as bearing on bias, prejudice and interest far out weighed any prejudice the Government might claim. *Davis v. Alaska,* 415 U.S. 308 (1974).

It was an abuse of discretion for the Trial Court to preclude testimony on this issue. The Court could have allowed the introduction of the evidence and instructed the jury that it had no relevance or bearing on Knapp's guilt nor was it dispositive of Torina's innocence. *U.S. v.*

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*Petitioner did not testify at Torina's trial.

Catalano, 491 F.2d 268 (2d Cir.), *cert. den.* 419 U.S. 825 (1974).

Strong parallels can be drawn between the issues at bar and *Davis v. Alaska, supra.* The partiality of the witness Torina was subject to exploration at trial. In denying Petitioner an opportunity to explore Torina's motives, the Court denied the jury information essential for it to make a "discriminating appraisal" of Torina's motive and bias. *U.S. v. Campbell,* 426 F.2d 547 (2d Cir. 1970).

The District Court and Court of Appeals have committed unsupportable error and have brought about a fundamental denial of Petitioner's right to a fair trial. U.S. Constitution, Amendment VI.

Petitioner respectfully posits that a clear case, calling for the exercise of this Court's power of supervision, has been made.

II

THE TRIAL COURT'S JURY INSTRUCTION ON EMBEZZLEMENT WAS ERRONEOUS AND CONFUSED THE ISSUES OF TAX FRAUD AND EVASION RIGHTFULLY BEFORE THE JURY.

Petitioner was indicted for making, subscribing and filing false tax returns for 1977 and 1978 and for attempting to evade taxes for the same years.

The Trial Court included in its instructions to the jury a charge on the issues and elements of embezzlement.

In fact, the Judge used these very words, "So in this case, before the defendant can be found to have embezzled money or funds of his employer, NBC, it must appear beyond a reasonable doubt from the evidence . . . " (Appendix J, *infra*).

Petitioner was not indicted by a Grand Jury for such

a charge, nor did he defend, or was obligated to defend, himself relative to that charge.

Indeed, the Trial Judge precluded examination into NBC's knowledge and sanction of certain practices by NBC Unit Managers in the performance of their duties. These issues would have been relevant if the charge was embezzlement. A full and fair trial of the issue of embezzlement was not, and should not have been, before the jury. Yet, the Court clearly asked the jury to decide that very issue.

The Trial Court does not have the power to, sua sponte, amend an indictment. This is violative of the U.S. Constitution, Amendment V, and the principles set forth in *Stirone v. U.S.*, 361 U.S. 212 (1960). The Court of Appeals failed to address this crucial issue.

Additionally, by so instructing the jury, the Court confused and misled the jury as to the issues before them. This instruction focused the jury's attention away from the crucial issues of the case and made it possible for Petitioner to be convicted of a crime for which he was not indicted.

As a result of the Trial Court's instruction it is unclear as to the basis upon which the jury reached its conclusion of guilt. *U.S. v. Clark*, 475 F.2d 240 (2d Cir. 1973).

III

IN A SPECIFIC ITEM TAX FRAUD AND EVASION PROSECUTION EVIDENCE OF NET WORTH AND EXPENDITURES SHOULD NOT BE ADMISSIBLE UNLESS THE GOVERNMENT COMPLIES WITH CERTAIN SAFEGUARDS.

This prosecution, according to the Government, was to be based on a specific item method of proof. However, many questions put to Petitioner, his wife and his accountant were designed to, and did, create a distorted picture of Petitioner's net worth and expenditures for the years in question.

The later two methods of proving tax fraud and evasion, cautioned Mr. Justice Clark, involve "something more than the ordinary use of circumstantial evidence." Indeed, they are so "fraught with danger" that Appellate Courts must closely scrutinize their use. *Holland v. U.S.*, 348 U.S. 121 (1954); also, *Taglianetti v. U.S.*, 398 F.2d 558 (1st Cir. 1968), aff'd, 394 U.S. 316 (1969).

Yet, the Court of Appeals decided this question of substance in a way not in accordance with applicable principles plainly stated in the aforementioned cases. In responding to this claim, the Court below sidestepped the real issue with these words:

> "Because the Government sought to establish Knapp's income tax violations by proving that he obtained specific items of unreported income rather than by inference from unexplained increase in his net worth, his claim based upon *Holland* . . . is inapposite."

A review of the record reveals that a large portion of the Government's cross-examination of Petitioner, his wife and accountant, plus the direct testimony of two

rebuttal witnesses was designed to show that the Knapps made expenditures in excess of their disposable income.

The danger and prejudice of allowing this type of questioning is self-evident. It should not be permitted without a detailed and accurate analysis by the Government of the accused's entire financial situation.

In holding that there was no error in such questioning the Court of Appeals has allowed the Government to circumvent the safeguards mandated by this Court. *Holland, supra; Taglianetti, supra.*

The tremendous leeway, accorded the Government in this area, put Petitioner in the position of having to prove his innocence. He was effectively denied his presumption of innocence. It was to safeguard against this type of perilous situation that the requisite safeguards were developed. *Holland, supra.*

Petitioner submits that what took place in the Trial Court must be corrected. Undoubtedly, in the future, the Government will opt to avoid the effort and expense of a net worth or expenditure prosecution by bringing the case under the pretense of "Specific Item" — no matter how weak their case-in-chief may be. Then, through cross-examination and rebuttal, the accused can be prejudiced by net worth/expenditure evidence. The abuse is evident herein; guidelines must be set.

IV

THE STANDARD OF JUDICIAL CONDUCT WAS BREACHED BY NUMEROUS REMARKS BY THE TRIAL JUDGE BEARING ON THE VERACITY AND CREDIBILITY OF PETITIONER AND DEFENSE WITNESSES AND BY THIRTY SUA SPONTE RULINGS FAVORABLE TO THE PROSECUTION.

Consideration by this Court is necessary on the independent ground that the holding below conflicts squarely with *Quercia v. U.S.*, 289 U.S. 466 (1933), and related cases from the Second Circuit.

The Trial Court's injudicious conduct denied Petitioner a fair trial. The Trial Judge made remarks and comments dealing directly with the veracity and credibility of Petitioner and his four key defense witnesses.

The following passages, admittedly taken out of context, are illustrative of the type of repeated colloquy that took place between the Trial Judge and Petitioner or his witnesses:

(a) To Petitioner:

Q. Are there any invoices in 1977 or 1978 that you falsified?

A. Well, falsified — that I made adjustments on, yes.

THE COURT: That you said something that wasn't true. That is what we mean when we say falsified.

THE WITNESS: Yes, sir.

THE COURT: I just want you to understand that false is something that you know is not true.

THE WITNESS: Yes, sir.

(b) To defense witness Koiv:

Q. If it was not voucherable, it was required to be submitted in another form and in another voucher, isn't that so?

A. Well, in the same voucher, but in another form, sure.

THE COURT: You mean called something else?

THE WITNESS: Correct, sir.

THE COURT: Which you knew it wasn't.

THE WITNESS: Correct, but it is a —

THE COURT: You deliberately put down a false expense?

THE WITNESS: It is not a false expense, sir. The money was spent.

THE COURT: But not for what you said it was?

THE WITNESS: Correct.

THE COURT: And that, of course, is not false.

THE WITNESS: The money was spent, sir.

And further:

THE COURT: You don't understand the difference between truth and falsehood?

THE WITNESS: All I know, sir, is that I spent money —

THE COURT: Do you understand the difference?

THE WITNESS: I have my own conception of it.

THE COURT: So do we. Go ahead.

(c) To Petitioner:

Q. Where did you keep this cash?

A. We kept some cash in a safe deposit box for the purpose of this film, that we used to accumulate. I used to turn all my checks over to my wife — she had me on an allowance, I was traveling —

THE COURT: The question is, where did you get the cash? Let's see if you can answer a question straight without all these explanations.

MR. DICKER: Your Honor, the questions are being

answered straight.

THE COURT: No, it isn't the question where he got the cash. Nobody asked about if he was traveling or what he was doing.

These types of facetious and disparaging remarks appear repeatedly throughout the record.

In response to this claim, the Court of Appeals commented, that, "While some of Judge MacMahon's comments . . . 'would better have been left unsaid', they were neither so many nor so prejudicial that Knapp was deprived a fair trial".

It is respectfully submitted that the aforesaid is an acknowledgement that the standard of judicial conduct, in the Second Circuit, has been breached. It is tantamount to an admission, that " . . . an appearance of impartiality and judicial detachment" did not " . . . prevail at all times". *U.S. v. Nazzaro,* 472 F.2d 302 (2d Cir. 1973), citing *U.S. v. Curcio,* 279 F.2d 681 (2d Cir. 1960)

Hopefully, this Court will determine that a review of the entire record is warranted. It will then become clear how pervasive the injudicious conduct was. Clearly, the Trial Judge lost sight of the tremendous impact and influence his "lightest remark" may have on a jury. *Quercia, supra.*

Additionally, the Trial Court made 30 sua sponte rulings which precluded questioning by defense counsel. The Court made only five such rulings on behalf of Petitioner. Our system of advocacy demands that a presiding judge function separately from the prosecution. The great disparity in the number of such rulings further conveyed the Trial Court's partiality to the jury.

The position taken by the Court of Appeals on these issues manifests a repudiation of the standards which this Court enunciated in *Quercia,* concerning the principles applicable to judicial conduct. This type of conduct by the

Trial Court must not be condoned. A slap on the wrist cannot suffice when a man's liberty is at stake.

Based upon the language of the Court, it is apparent that we have drifted into a gray area — the Court of Appeals characterized the Trial Judge's remarks as "neither so many nor so prejudicial". Petitioner asks, how many prejudicial remarks are enough? How prejudicial must the remarks be?

Petitioner submits that being prejudiced is somewhat like being pregnant — you either are or you are not. Once one is prejudiced by the type of remarks suffered by Petitioner herein it is impossible to receive the fair trial to which everyone is entitled. U.S. Constitution, Amendment VI

The Trial Judge himself, with his sarcastic remarks and constant intrusions into the trial, did more to undermine Petitioner's credibility than hours of cross-examination by the prosecution. One such remark, by the presiding Judge, can put an accused in such a bad light that he may never recover in the eyes of the jury. Here, such remarks were plentiful.

Petitioner suggests that it is time for this Court to clarify the standard prescribed, nearly fifty years ago, in *Querica*.

CONCLUSION

The petition for a Writ of Certiorari should be granted to review the decision of the United States Court of Appeals for the Second Circuit. Indeed, Petitioner respectfully submits that the error of the Court of Appeals is so clear and fundamental that summary reversal of the conviction is warranted.

Respectfully submitted,

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